Supreme Court, U. S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1522

RAMSEY ALEXANDER, et al.,
Petitioners,

versus

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

and

AVCO CORPORATION, AEROSPACE STRUCTURES DIVISION,
Respondents.

## RESPONDENT AERO LODGE NO. 735's BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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### I

### QUESTION PRESENTED

When a body of high-seniority laid-off employees had an arguable contractual right to immediate recall for training and then production work in a different skill, was such recall by the employer at the Union's insistence rendered an unfair employment practice in violation of Title VII of the Civil Rights

Act of 1964 by the fact that the employer knew that there would have to be a substantial layoff during the following months, and that more recently employed low-seniority black employees would therefore suffer earlier layoff as a result of such recall?

## II

## STATEMENT OF THE CASE

In addition to the aspects of the Globe-Wernecke recall described by petitioners (Petition for Certiorari, pp. 7-10), the triennial collective bargaining agreements between respondent AVCO and respondent Union at all material times had provided for two types of recall rights following layoff, occupational recall and general recall, and the forms utilized by AVCO to permit employees to register for recall at the time of layoff contained blocks for the employee to choose between general recall and occupational recall (R. 1004-1005).[1] Any employee who opted for occupational recall would be entitled thereby to recall by seniority in the occupation from which he was laid off. Each employee who opted for general recall would be entitled to recall into any occupation or job in the plant for which he was qualified after all employees having job equity in such occupation had been recalled to work; *e.g.*, employees who opted for general recall had a right to be recalled to the first available employment, by seniority, in preference to new employees AVCO would otherwise be hiring off the street.

Earlier, when AVCO lost a contract for the assembly line manufacture of freezers, freezer employees who opted for general recall had been recalled for training and subsequent pro-

[1] Record references are to the pagination of the Joint Appendix in the Court of Appeals.



duction work in aircraft assembly bench and jig (R. 1004-1005). Later, when AVCO lost its Philco assembly line in 1964, Philco employees who opted for general recall instead of occupational recall were hired and placed into assembly bench and jig training and then production when AVCO again started hiring new bench and jig workers (R. 283, 1005-1009).

On the occasion of the Globe-Wernecke layoff, over 150 employees were laid off, many with more than 20 years' seniority (R. 674, 670), 73 of these employees opted for general recall and were put into assembly bench and jig training followed by production assignment in this occupation, and the Union throughout insisted that these employees were entitled to recall as a matter of contractual right, both in the District Court and in the Court of Appeals. The evidence submitted by the Union and herein summarized was subjected to no effort at refutation either by the petitioners or by the respondent AVCO.

Additionally, although AVCO had projected a future layoff, there was no evidence offered to prove that the respondent Union had knowledge of such projection. The only evidence on the subject of such possible knowledge was the testimony of the Union's business representative that he knew there was no imminent projected layoff at the time of the Globe-Wernecke recall, because he had been told by an AVCO official that although there was to be a phase out of the C-5A aircraft wing construction work, there was to be a simultaneous increase in the L-1011 aircraft wing work which would take up the C-5A people (R. 1026, 1029), and no effort was made by any party to refute this testimony.

## III

## ARGUMENT

It is the position of respondent Union that the Writ of Certiorari should be denied because (1) the question petitioners desire to present is a hypothetical one not raised by the case and (2) the record establishes that neither of the two remaining plaintiffs who have petitioned for certiorari is a member of the class of employees laid off early as a result of the Globe-Wernecke recall, and they therefore lack class action representational authority and standing to raise the issue they present.

The District Court, in holding that the Globe-Wernecke recall violated the collective bargaining agreement, enunciated no rationale related to any provision of the agreement as to how the recall violated the contract, and in its holding, it did not even take any notice of the respondent Union's insistence that the general recall provisions of the collective bargaining agreement gave the 73 Globe-Wernecke employees an absolute contractual right to be recalled to perform the same services that AVCO was employing people off the street to perform—training in the assembler bench and jig occupation followed by assignment work in that occupation (31a-35a).

In its reversal of the District Court's holding that the Globe-Wernecke recall violated the bargaining agreement (100a-104a), the learned Court of Appeals stated its conclusion, "It is true that no obligation to retain laid off employees of AVCO existed under the collective bargaining contract." (103a) In such statement of its conclusion, the Court of Appeals did not state its rationale, took no note of the Union's argument as to general recall rights and enunciated no theory why employees who had opted for general recall had less rights than new employees AVCO was then hiring off the street, the right of assignment to training duty followed by assignment to production duty.



Thus, while the Court of Appeals gave the lack of any conflicting evidence proper effect in holding that the record contained no evidence of unfair employment practices in denial of a promotion to the plaintiff Alexander (108a-110a), it failed to give such effect to the lack of conflicting evidence in regard to the Globe-Wernecke employees' exercise of their general recall option (103a).

If respondent Union be incorrect in its long standing insistence that these employees had an absolute right under the seniority system to general recall to training assignment followed by production assignment, it is nevertheless certain that neither of the lower courts has enunciated any rationale endeavoring to demonstrate that the Union's position is incorrect. It is certain that if AVCO had refused to honor is general recall obligations to these 73 employees, it could have raised no valid defense to its obligation to arbitrate a Union grievance under *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960) and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Hence, the Union and the employer evidently could properly compromise the claim of settlement to recall under *Humphrey v. Moore*, 375 U.S. 335 (1964).

Under these circumstances, it would appear that the question petitioners seek to present actually involves the enforcement or recognition of claimed seniority rights evidenced both by long usage and specific provisions of the collective bargaining agreement, so that petitioners seek herein to re-litigate issues resolved by the Court in *International Brotherhood of Teamsters v. United States*, — U.S. —, 52 L.Ed.2d 396 (1977), pursuant to the rationale of *Washington v. Davis*, 426 U.S. 229 (1976) and *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Further, the record conclusively established that the two remaining plaintiffs lacked class action standing to question the

Globe-Wernecke recall, because each of these remaining plaintiffs were old employees with considerable seniority who had been discharged some years before the Globe-Wernecke layoff and recall and who, even if they had not been discharged, would not have been among the body of new junior employees subject to earlier layoff by virtue of the Globe-Wernecke recall. The only racial wrongs of these two petitioners which were remedied were the wrong of being subjected to discriminatory discharge on the ground of race, and neither of them claimed to have been prejudiced by any operation of the seniority system similar to its operation in the Gloge-Wernecke incident. Respondent Union, in regard to the individual claims of these two petitioners, was held guilty only in its processing of petitioner Newman's arbitration case and was not held guilty of any racially discriminatory conduct in regard to the petitioner Dennis.[2]

Under the teaching of *Singleton v. Wulff*, 428 U.S. 106 (1976), as applied in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (particularly 428 U.S. at p. 62, n. 2), the present petitioners were not so prejudiced as "to satisfy the 'case or controversies' requirement of a federal court's Art. III Jurisdiction." (428 U.S. at p. 62, n. 2). Accord: *East Texas Motor Freight System Inc. v. Rodrigez*, —U.S.—, 52 L.Ed.2d 453 (1977). Though the physicians in *Planned Parenthood, supra*, in being denied in fact the right to perform abortions, shared a community interest with a large class of mothers being denied the right to have abortions, and though that large class of mothers necessarily included a smaller class who objected to being deprived of their parental rights, the physicians suffered no loss from the deprivation of parental rights to some members of the larger class and their own relation to the smaller class was an emotional and philosophical one, which this Court held an inadequate basis for class action representational authority. The same rationale applies in the instant case.

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[2] In the lengthy trial, none of the witnesses were early lay-off victims of the Globe-Wernecke recall.



WHEREFORE, respondent Aero Lodge No. 735 respectfully submits that the petition for certiorari should be denied.

Respectfully submitted,

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